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No.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1982



CLEVELAND TURNER, 



Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

PETITION OF CLEVELAND TURNER
FOR WRIT OF CERTIORARI

SAMS, GERSTEIN & WARD, P.A.
700 Concord Building
66 West Flagler Street
Miami, Florida 33130
Telephone: (305) 374-3181

By: Richard E. Gerstein
Paul M. Rashkind
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the decision below, *United States v. Kopituk*, ____ F.2d ____ (11th Cir. 1982), which allows for replacement of a juror after the jury has retired for deliberations, is in conflict with the decision of *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), which holds that it is per se reversible error for a trial court to replace a juror after the jury has retired to deliberate.

2. Whether a United States District Court may properly replace a juror after the jury has retired to deliberate.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional, Statutory and Rule Provisions Involved	3
Statement of Case	5
Reasons for Granting Writ	8
Conclusion	22
Certificate of Service	23
Appendix (Opinion of Eleventh Circuit Court of Appeals of November 4, 1982; District Court's Order Replacing Juror)	Bound Separately

TABLE OF AUTHORITIES

Authorities	Page
<i>Bruton v. United States</i> , 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)	17
<i>Henderson v. Lane</i> , 613 F.2d 175 (7th Cir. 1980)	16
<i>Krulewitch v. United States</i> , 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed.2d 790 (1949)	18
<i>State v. Lehman</i> , 321 N.W.2d 212, (Wis. 1982)	16, 20
<i>United States v. Allison</i> , 481 F.2d 468, (5th Cir. 1973) <i>subsequent appeal</i> , 487 F.2d 339 (5th Cir. 1973) <i>cert. denied</i> , 416, U.S. 982, 94 S.Ct. 2383, 40 L.Ed.2d 759 (1974)	11, 13
<i>United States v. Evans</i> , 635 F.2d 1124 (4th Cir. 1980)	13
<i>United States v. Hayutin</i> , 398 F.2d 944 (2d Cir. 1968) <i>cert. denied</i> , 393 U.S. 961, 89 S.Ct. 400, 21 L.Ed.2d 374 (1968)	11, 13
<i>United States v. Kopituk</i> , ____ F.2d ____ (11th Cir. 1982)	1, 2, 21

TABLE OF AUTHORITIES (Continued)

	Page
<i>United States v. Lamb</i> , 529 F.2d 1153 (9th Cir. 1975)	2, 7, 8, 10, 11, 13, 15, 21
<i>United States v. Nash</i> , 414 F.2d 234 (2d Cir. 1969) <i>cert. denied</i> , 396 U.S. 940, 90 S.Ct. 375, 24 L.Ed.2d 242 (1969)	11
<i>United States v. Phillips</i> , 664 F.2d 971 (5th Cir. Unit B 1981)	8, 9, 14, 15, 16
<i>United States v. Virginia Erection Corporation</i> , 325 F.2d 868 (4th Cir. 1964)	8, 9, 10
Constitutional and Statutory Provisions	
<i>Article III, Section 2, Clause 3 of the United States Constitution</i>	5
<i>Fifth Amendment of the United States Constitution</i>	4
<i>Sixth Amendment of the United States Constitution</i>	4
<i>Rule 24(c), Federal Rules of Criminal Procedure</i>	3, 7, 8, 9, 10, 11, 12, 13, 15, 20, 21

TABLE OF AUTHORITIES (Continued)

	Page
Other Authorities	
American Bar Association Project on Minimum Standards for Criminal Justice, <i>Standards Relating to Jury Trial</i> , Approved Draft (1974) and Second Edition (1980)	12
H. Kalven & H. Zeisel, <i>The American Jury</i> (1966)	17
Judicial Conference Committee on <i>Federal Rules of Criminal Procedure</i> , 30 Cr.L.Rptr. 3001 (1981)	19
Morgan, <i>Some Problems of Proof</i> <i>Under the Anglo-American System</i> <i>of Litigation</i> (1956)	18
Orfield, <i>Trial Jurors in Criminal Cases</i> 29 F.R.D. 43 (1962)	12
<i>Websters Third International</i> <i>Dictionary</i> (1971)	19
C. Wright, <i>Federal Practice and Procedure</i> (1969)	11

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OCTOBER TERM, 1982

DOROTHY O. KOPITUK, RAYMOND C. KOPITUK,
OSCAR MORALES, FRED R. FIELD, JR.,
CLEVELAND TURNER, JAMES VANDERWYDE,
LONDON L. WILLIAMS, WILLIAM BOYLE,
GEORGE BARONE

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition of Cleveland Turner for a Writ of Certiorari
to the United States Court of Appeals, Eleventh Circuit.

To the Honorable Chief Justice and Associate
Justices of the Supreme Court of the United States:

Cleveland Turner, Petitioner herein, prays that a
Writ of Certiorari issue to review the judgment of the
Eleventh Circuit Court of Appeals entered in the case
of *United States v. Kopituk*, ____ F.2d ____ (11th Cir.
1982), on November 4, 1982, rehearing denied January
14, 1983.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is currently unreported but is reprinted in the separately bound Appendix to this Petition at App. 1. The Order Replacing Juror of the United States District Court for the Southern District of Florida, is reprinted in the Appendix at App. 127.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals [App. 1] was entered on November 4, 1982. Petition for rehearing was denied on January 14, 1983. [App. 148] The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1243 (1).

QUESTIONS PRESENTED

1. Whether the decision below, *United States v. Kopituk*, ____ F.2d ____ (11th Cir. 1982), which allows for replacement of a juror after the jury has retired for deliberations, is in conflict with the decision of *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), which holds that it is per se reversible error for a trial court to replace a juror after the jury has retired to deliberate.

2. Whether a United States District Court may properly replace a juror after the jury has retired to deliberate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause involves Rule 24(c), Federal Rules of Criminal Procedure, which provides as follows:

(c) **Alternate Jurors.** The court may direct that no more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the the other peremptory challenges allowed by these rules may not be used against an alternate juror.

This case also involves the Fifth Amendment to the Constitution, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Also involved is the Sixth Amendment to the Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article III, Section 2, Clause 3 of the Constitution is also involved:

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

STATEMENT OF CASE

On June 7, 1978, a federal grand jury returned a 70-count indictment charging petitioners and others with a variety of offenses including racketeering and conspiracy to engage in racketeering, arising out of alleged corruption on the waterfronts of several major ports in the Southeastern United States. [App. 1-3].

The trial of petitioners commenced on January 28, 1979 and continued to September 1, 1979. [App. 2]. Guilty verdicts were returned against all of the petitioners. [App. 2-3].

The relevant facts of this petition involve only the jury deliberations.

At approximately 1:00 p.m. on Saturday, August 11, 1979, the jury retired to begin deliberations. The trial judge ordered the alternate jurors be sequestered and instructed them not to discuss the case, telling the alternates that "[t]here still is a possibility that you may have to serve." Deliberations lasted two and one-half hours on the first day. [App. 31].

Jury deliberations resumed on Monday, August 13 and each day thereafter until August 17. In the interim, on Wednesday, August 15, the trial judge released the alternates from sequestration and sent them home. In doing so, he specifically told the alternates that they were "discharged". Nevertheless, he proceeded to instruct them to avoid news coverage of the trial, not to discuss the case, and not to leave the State until the case was concluded "in the slim possibility that we might still call you." [App. 32].

On Friday afternoon, August 17, the court received a note from the foreperson expressing concern about the mental condition of a juror. Deliberations were suspended until Monday, August 20. [App. 32]. The next day, on August 21, the ill juror was discharged without objection. Defense counsel did object to proceeding with only an 11-person jury. [App. 33].

The following day, over objections of defense counsel, the trial court decided to substitute an alternate juror for the disabled juror. Before doing so, the trial court extensively questioned the alternate juror about her continued fitness to serve as a juror. The alternate testified that she had not discussed the case or received any extrinsic information about the case. She felt she was capable of rendering a fair and impartial verdict. [App. 34].

After questioning the alternate, the court examined each of the remaining jurors individually regarding their respective abilities to begin deliberating anew. Although some jurors expressed reservations about having to begin anew, each juror agreed to disregard

any opinions or conclusions previously expressed during deliberations and to start over again. [App. 34].

On Thursday, August 23, over defense objection, the alternate juror was substituted and seated with the eleven original jurors. The jury was re-instructed, during which time the court emphasized that the jurors were duty-bound to begin their deliberations afresh, disregarding all previous deliberations. [App. 34-35].

The jury then retired and deliberated for just over one week before returning guilty verdicts on September 1, 1979. [App. 35].

The propriety of the jury substitution procedure was argued in the direct appeals of the petitioners in the Eleventh Circuit Court of Appeals. The petitioners contended that Rule 24(c), Federal Rules of Criminal Procedure, does not permit juror substitution after the commencement of deliberations and that such substitution procedures are per se reversible error, citing *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975). The Eleventh Circuit ruled that, although the "rule is 'the rule'," deviation is permitted in "extraordinary situations . . . when extraordinary precautions are taken . . . to insure that the defendants are not prejudiced." [App. 46]. Rehearing was denied on January 14, 1983 [App. 148].

By this petition for writ of certiorari, Cleveland Turner seeks review of the decision of the Eleventh Circuit Court of Appeals.

REASONS FOR GRANTING WRIT

Rule 24(c), Federal Rules of Criminal Procedure, allows for alternate jurors to replace regular jurors "prior to the time the jury retires to consider its verdict." It also requires that all alternate jurors who have not replaced regular jurors "shall be discharged after the jury retires to consider its verdict."

Four decisions have analyzed Rule 24(c) and addressed a common and recurring issue: Whether a juror in a criminal case can be replaced after the jury has commenced deliberations. Each decision agrees that Rule 24(c) is controlling authority, yet the decisions take two completely conflicting positions.

The present decision of the Eleventh Circuit Court of Appeals, as well as its decision in *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981), take the view that juror replacement can occur *after* jury deliberations have begun. Two other decisions, the Ninth Circuit's *en banc* decision in *United States v. Lamb*, 529 F.2d 453 (9th Cir. 1975) and the Fourth Circuit's decision in *United States v. Virginia Erection Corporation*, 325 F.2d 868 (4th Cir. 1964), take the conflicting view that Rule 24(c) means what it says; that replacement of a juror after deliberations have begun is reversible error.

The conflict expressed in these decisions could not be more clear. In *Phillips*, on which the instant decision relies as binding precedent [App. 37], the court unequivocally stated its disagreement with the Ninth Circuit's *Lamb* decision and the *per se* reversal rule it

expresses. *United States v. Phillips, supra*, at 996, fn. 21.

The first decision to interpret Rule 24(c) in this context was *United States v. Virginia Erection Corporation, supra*. In that case, an alternate juror was permitted to retire to the jury room with the regular jury during deliberations because it was apparent that one of the regular jurors was ill. With the seeming agreement of all counsel, the alternate was instructed not to actually participate in the deliberation unless one of the regular jurors became ill or disqualified. The Fourth Circuit found this "unauthorized" procedure "collides sharply with the Rules of Criminal Procedure." The court held that the procedure constituted reversible error. At p. 873.

The legal analysis which led the Fourth Circuit to this conclusion is particularly applicable to this discussion, even though the factual setting differs from the present case. The Court reasoned:

Rule 24(c) is explicit in defining the function of an alternate juror and the time when his replacement of a disqualified juror begins, that is *prior* to the time when the jury retires to consider its verdict. It also provides that an alternate juror who does not so replace a regular juror *shall be discharged* after the jury retires to consider its verdict. [court's emphasis]

At p. 871

The court also analyzed the Committee history leading to the formulation and adoption of Rule 24(c). Although a rule permitting substitution of jurors during deliberations was once considered, it was rejected after the desirability and constitutionality of such a procedure was questioned by this Court. At p. 871. Concluding that "Rule 24(c) patently makes no provision for the replacement of a juror who becomes disabled after the jury retires to deliberate", the Fourth Circuit found that to allow such a procedure would be "not only contrary to the letter but also the spirit of Rule 24(c)." At p. 871. The court aptly stated that after the jury retired to deliberate, the alternate juror "had no legal standing as a juror." At p. 871.

The *en banc* decision of *United States v. Lamb*, *supra*, closely followed the contours cut by *Virginia Erection Corporation*. The trial court in *Lamb* originally excused the alternate juror when the jury retired to deliberate, but asked her to remain on "stand by" in case it was necessary for her to return. After four hours of deliberation over a two day period, the jury returned a guilty verdict which the trial court refused to accept because it was inconsistent with the law. After a luncheon recess, a juror complained he was emotionally unable to reach a decision. Over defense counsel's objection, the alternate juror was substituted for the complaining juror, the jury instructions were re-read and the court instructed the jury to "begin at the beginning, and begin all your deliberations just as if the case had been submitted to you this instant." The newly constituted jury retired to deliberate and again returned with a guilty verdict.

The *Lamb* court began its analysis by holding that Rule 24(c) creates a "mandatory requirement" that alternate jurors "shall be discharged" after the jury retires. The idea that Rule 24(c) created such a mandatory requirement was not novel; indeed, it followed the well-established and unanimous view of the two other Circuits which had ruled upon the issue. See *United States v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973); *subsequent appeal*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982, 94 S.Ct. 2383, 40 L.Ed.2d 759 (1974); *United States v. Hayutin*, 398 F.2d 944 (2d Cir. 1968), *cert. denied*, 393 U.S. 961, 89 S.Ct. 400, 21 L.Ed.2d 374 (1968), *subsequent appeal sub. nom.*, *United States v. Nash*, 414 F.2d 234 (2d Cir. 1969), *cert. denied*, 396 U.S. 940, 90 S.Ct. 375, 24 L.Ed.2d 242 (1969). Likewise, the *Lamb* court found persuasive the view expressed by Professor Charles Wright in his treatise, *Federal Practice and Procedure* (1969) §388, Vol. 2 at p. 52:

The unambiguous language of the Rule and the cases interpreting it have impelled one of the Nation's most prestigious legal commentators to conclude that ". . . it is reversible error, even though the defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate or to substitute an alternate after deliberations have begun." [footnote omitted].

At p. 1156

The court also took note that other authorities had rejected efforts to amend the Rule to allow substitution after deliberations had begun. See Orfield,

Trial Jurors in Criminal Cases, 29 F.R.D. 43, 46 (1962); American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Jury Trial*, Approved Draft, §2.7 at p. 326 (1974).¹ Indeed, it observed that the Report of the Jury Committee of the Judicial Conference of the United States (March 1973 at 7-8), specifically disapproved a proposed revision of Rule 24(c) that would retain jurors for possible substitution after deliberations had started. At p. 1156.

Buttressing the persuasive authorities outlined by the court was its own simple, yet logical, concern for the strong likelihood of prejudice inherent in such substitutions. The court found that when the alternate juror does participate in deliberations, even as a substitute juror, "the distinct probability of prejudice to the accused is a fact that we cannot ignore." At p. 1156, fn. 3. It went on to hold:

When, as here, an alternate is permitted to participate in the jury's deliberations after the original jury has retired for deliberations, the violation of the plain prohibition of the Rule is so patently impermissible that the "possibility of prejudice" . . . is manifest.

At p. 1156, fn. 3.

It was for these reasons that the *Lamb* court held juror substitution after the commencement of

¹The current ABA Standards and Commentary continue to reject the idea that juror substitution should be permitted after the jury retires to deliberate its verdict. ABA Standards 2d Ed. §15-2.7; Commentary p. 15-74 (1980).

deliberations is violative of Rule 24(c) and per se reversible error.² It is equally important to observe that the court's holding was not based upon an apparent coercion of the alternate which was suggested by the chronology of the deliberations. In footnote 7, at page 1156, the court stated:

While we have noted the obvious coercive effect suggested by the final deliberative period of only twenty-nine minutes, that is not a factor contributing to our conclusion in this case. The mandatory provision of Rule 24 having been violated, the period of time during which the substitute juror participated in the deliberations is essentially irrelevant.

Until 1981, it was thus clear that if, over objection, an alternate juror was substituted after deliberations began, and participated in deliberations leading to a guilty verdict, Rule 24(c) was violated and reversal of the conviction was mandatory.³ Then, in 1981, the soon-

²Two cases on which the court relied in part, were distinguished in other particulars. Neither *Allison* nor *Hayutin* held the violation of Rule 24(c) to be *ipso facto* prejudicial error requiring reversal in all cases. But the reason for their conclusions was that "the alternate(s) did not participate in the jury's deliberations in any way." *Lamb*, at p. 1156, fn. 3. In *Lamb*, as well as in the case *sub judice*, the alternate juror did participate in the deliberations, after having been excused. "In these circumstances," the *Lamb* court noted, "the distinct probability of prejudice to the accused is a fact, we cannot ignore . . . [T]he 'possibility of prejudice' . . . is manifest." At p. 1156, fn. 3.

³As late as 1980, the Fourth Circuit re-affirmed *Lamb's* holding that, absent a knowing waiver, juror substitution cannot occur after deliberations commence. *United States v. Evans*, 635 F.2d 1124 (4th Cir. 1980) at p. 1128, fn. 6.

to-be Eleventh Circuit decided *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981). In that case, the jury retired to deliberate but the trial court refused, over defense objection, to discharge the alternate. Instead, the alternate was separately sequestered and directed not to watch television newscasts. Four days later, after one and one-half official days of deliberations, health problems necessitated the excusal of a regular juror. At p. 990. Over defense objection, the alternate was substituted, after being questioned and assuring the court that he had not discussed the case, had not received extrinsic information about it, and that he could work with other jurors from a "clean slate". The other jurors were then questioned. Significantly, the court did not ask the jurors whether they had personally or collectively already arrived at opinions or conclusions about any of the charges or defendants. At p. 991. But each juror was asked to "wipe from his or her mind the deliberations of the two previous days and begin anew." Each juror gave such an assurance, the court reinstructed the new jury and instructed them to begin deliberations anew. A foreman was again elected and the jury deliberated for six days until reaching guilty verdicts.

Although the *Phillips* appellate decision preceded the present appellate decision, the trial court's action was conducted after the trial court action in the present case. Actually, the district court in *Phillips* based its substitution procedure on the district court procedure utilized *sub judice*. *Phillips*, at p. 991, fn. 13.

The *Phillips* court disposed of the issue before it by holding (1) the requirements of Rule 24(c) regarding substitution of jurors is not constitutionally mandated;

(2) Rule 24(c) is "a mandatory provision that should be scrupulously followed"; (3) the initial decision of the trial court not to discharge the alternate was a violation of Rule 24(c); (4) violation of the Rule is not, as *Lamb* holds, per se reversible error; (5) the procedure utilized by the trial court, although erroneous, neutralized the possibility of prejudice to the defendants; and (6) since the court could discern no prejudice from the record-on-appeal, reversible error was not demonstrated.

In simple terms, the court found harmless error. Because the trial was complex and lengthy (lasting over four months), the court considered judicial economy to prevail over the defendants' request for a new trial. At p. 996. It disparaged the teachings of *Lamb* by claiming that the chronology of deliberations in *Lamb* distinguished the cases. Of course, in doing so, it ignored the *Lamb* court's own disclaimer which said that the chronology of deliberation had been "essentially irrelevant" to its holding of reversible error. *Lamb*, at p. 1156, fn. 7.

When the present case came before the Eleventh Circuit, it found *Phillips* to be binding precedent [App. 37], despite recognized distinctions in the cases. First, the alternate *sub judice* was actually discharged and released,⁴ while in *Phillips* he was sequestered until substituted. The alternate herein was discharged and "at large" for more than a week before being seated as

⁴Four days after the jury retired, the alternates were discharged and released. They were, though, told to avoid all newspaper and television coverage of the trial, not to discuss the case with anyone or leave the state, "in the slim possibility that we still might need you." [App. 32].

a substitute juror. Second, the jury *sub judice* had been retired for deliberations for twelve days before substitution, while in *Phillips* the time of deliberation was significantly less — two days.

The substitution procedure followed, and jury instructions given, in both cases were essentially identical. And it is important to stress that, as in *Phillips*, the trial court herein never asked the original eleven jurors if they had personally or collectively already arrived at opinions or conclusions about any of the charges or defendants. It is equally important to note that some jurors *sub judice* did express reservations about having to begin their deliberations anew. App. 34. And finally, it is vital to stress the appellate court's own concession that "the further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." [App. 43-44].

It is respectfully submitted that the present decision is erroneous for two reasons: (1) due process of law does not permit juror substitution after deliberations have begun,⁵ and (2) violation of Rule 24(c) jury substitution procedures is per se reversible error. Both reasons are bottomed on the same premise — Human limitations prevent the newly-created jury from rendering a unanimous verdict based upon common deliberations.

Although "[l]ittle is known about the deliberative process of the jury," *State v. Lehman*, 321 N.W.2d 212, 220 (Wis. 1982), and this Court has acknowledged the

⁵Some decisions dispute the Constitutional basis of Rule 24(c), i.e., *Henderson v. Lane*, 613 F.2d 175 (7th Cir. 1980), but none of those decisions have considered the argument as presented in this petition.

impossibility of determining what a jury has done in the process of returning a guilty verdict, *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), scholars have described the deliberative process as "an interesting combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion." H. Kalven & H. Zeisel, *The American Jury* (1966) at p. 489. It is this gradual change of individual perceptions resulting from group discussion which represents the very essence of jury deliberation. Since a substitute juror is deprived of the benefit of part of the discussion, the metamorphosis of his perceptions and conclusions is separate from the remaining jurors and whatever verdict is returned does not result from common deliberations.

To avoid this problem, the Eleventh Circuit suggests that the original jurors can be instructed to wipe the slate clean and begin deliberations anew with the substitute juror. Easier said than done.

This Court has long recognized that jurors are human, subject to human limitations and that certain things cannot be wiped from a juror's mind, even by court instruction. For example, *Bruton v. United States*, *supra*, at p. 135, expressed the view that:

there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and

human limitations of the jury system cannot be ignored.⁶

The *Bruton* decision went on to quote criticism of limiting instructions found in Morgan's *Some Problems of Proof Under the Anglo-American System of Litigation* (1956). Morgan suggested that the use of limiting instructions fosters an inconsistent attitude toward juries by "treating them at times as a group of low-grade morons and at other times as men endowed with superhuman ability to control their emotions and intellects." At p. 133, fn. 8.

To suggest that eleven people—no matter how well-intentioned—can honor a judicial command that they "put out of your minds all the deliberations you have engaged in thus far" and "start fresh as if the past days have simply not happened" [App. 35, fn. 14], is to believe that jurors are indeed superhuman. Lest the gravity of the court's instruction be missed, it should be noted that the instruction commands the eleven jurors to forget the events of twelve days, including at least five full days of deliberations. Since the "new jury" took only a week to arrive at verdicts, it is fair to say that the jury was asked to forget deliberations on

⁶Quoting from Judge Learned Hand, this Court observed: "The limiting instruction is a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.'" The limiting instruction, said Judge Hand is a "placebo" medically defined as "a medicinal lie." At p. 133, fn. 8. Mr. Justice Jackson, in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct 716, 93 L.Ed 790 (1949) commented similarly: "The main assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."

numerous defendants and charges which were approximately 5/7 completed. By definition, such a feat is simply impossible.

Deliberation is defined as "the act of weighing and examining reasons for and against a choice or measure: careful consideration: mature reflection . . . : a discussion and consideration by a number of persons of the reasons for and against a measure . . ." *Websters Third International Dictionary* (1971). It is a process in which one juror attempts to educate others about the reasons supporting a contention. It is learning.

Can man forget on command what he has learned? Is the human mind so mechanized that it can compartmentalize and expunge thoughts at will? Just as this Court has found that "[a] jury cannot 'segregate evidence into separate intellectual boxes' . . .", *Bruton* at p. 130, so too a jury cannot be expected to segregate the words and thoughts of five full days of deliberation into separate intellectual storage boxes. Under the best of circumstances, with the best of intentions, the task is superhuman.

It was this realistic recognition of human limitations that caused the Judicial Conference Committee on the Federal Rules of Criminal Procedure, 30 Cr.L.Rptr. 3001 (1981) to again reject efforts to allow juror substitution after deliberations commence:

The central difficulty with substitution . . . is that there does not appear to be a way to nullify the impact of what occurred without the participation of the new juror. Even were

it required . . . that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations.

Quoted in State v. Lehman, supra, at p. 222.

Jury deliberations are unquestionably the most sensitive portion of any criminal trial. It is not an appropriate time to experiment with *ad hoc* procedures violative of established law.

The law does not allow substitution of jurors after a jury retires to deliberate, for to allow it would deprive the defendant of an essential feature of the jury trial, a unanimous verdict based upon common deliberations. Rule 24(c) is indeed borne of the Constitutional requirement of due process of law and its violation in this context mandates a finding of per se reversible error.

However, even if Rule 24(c) lacks Constitutional roots, it remains the only proper procedure governing this critical portion of a criminal trial. It is indisputably a "mandatory" rule which protects the integrity of jury deliberations. The Rule is, so it seems, a delicate balance between judicial economy and recognized human limitations. To violate the Rule for any reason, under any circumstances, is to upset the balance and mutate the deliberative process.

It is respectfully submitted that this Court should exercise its discretionary authority to resolve the conflict between *Lamb* and *Kopituk*, thereby clarifying the permissible parameters of juror substitution in the federal courts. The Court should re-affirm the vitality of Rule 24(c) and the *Lamb* decision by holding that it is per se reversible error for a federal court to substitute jurors after deliberations have begun.

CONCLUSION

For the reasons stated, petitioner prays that this Court issue a writ of certiorari to the Eleventh Circuit Court of Appeals.

**SAMS, GERSTEIN &
WARD, P.A.
700 Concord Building
66 West Flagler Street
Miami, Florida 33130
Telephone: (305) 374-3181**

By: RICHARD E. GERSTEIN
Richard E. Gerstein

By: PAUL M. RASHKIND
Paul M. Rashkind

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Rule 28, Supreme Court Rules, that three (3) true and correct copies of Petitioner's Petition for Writ of Certiorari and separately bound Appendix were served by mail this 15th day of March, 1983, upon:

**Hon. Stanley Marcus
United States Attorney
155 South Miami Avenue
Miami, Florida 33130**

**Hon. S. Michael Levin
Special Attorney
U.S. Dept. of Justice
77 SE 5th Street
Miami, Florida 33131**

**Hon. Rex E. Lee
Solicitor General
Dept. of Justice
Washington, D.C. 20530**

**Max B. Kogen, Esq.
Suite 500
700 Brickell Avenue
Miami, Florida 33131**

**Karl J. Leib, Jr., Esq.
New World Tower
100 Biscayne Blvd., North
Miami, Florida 33132**

Lacy Mahon, Esq.
305 Adams Street
Jacksonville, Florida 32202

Michael A. Masin, Esq.
310 Biscayne Bldg.
19 W. Flagler Street
Miami, Florida 33130

E. David Rosen, Esq.
310 Biscayne Bldg.
19 West Flagler Street
Miami, Florida 33130

Joseph A. Varon, Esq.
2432 Hollywood Blvd.
Hollywood, Florida 33020

Michael H. Tarkoff, Esq.
1414 Coral Way
Miami, Florida 33145

Such service is in accordance with Rule 28, Supreme Court Rules.

RICHARD E. GERSTEIN

Richard E. Gerstein

PAUL M. RASHKIND

Paul M. Rashkind